

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X

The Authors Guild, Inc., Associational Plaintiff,	:
Betty Miles, Joseph Goulden, and Jim Bouton,	:
individually and on behalf of all others similarly	:
situated,	:
	:
Plaintiffs,	:
	:
v.	:
	:
Google Inc.,	:
	:
Defendant.	:
	:

----- X

Case No. 05 CV 8136-DC

EXHIBIT

2

[PART 2 OF 3]

**TO THE DECLARATION OF MICHAEL J. BONI IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT GOOGLE'S MOTION FOR SUMMARY JUDGMENT**

From inside the book

9 pages matching **witness** in this book

Page 38

know, I'm not even sure I could locate the criminal courts here in the District."

One Covington and Burling partner said the firm avoids criminal work for two reasons. The firm's built-in expenses are such that few criminal defendants can afford the per-hour fee of \$50

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dent lawyer-lobbyist, is famed for the hot-box training he gives Ford witnesses the night before they testify. Markley puts the witness in a chair in Ford's Shoreham Hotel suite and asks him the nastiest questions conceivable for hours. Get rid of the

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nunciatory obiter dicta on the evils of the financial community; even if a banker witness has the right answer, and proves that the premise of Patman's query is wrong, the damage is done—immediately, to the banker's ego and temper; the next day, in

From inside the book

9 pages matching **stand** in this book

Page 40

all, at the taxpayers' expense. Gesell had kept GE officials off the public witness stand, however, and he did not intend to let the consumers win a backdoor victory. Regardless of the public-policy issues, he maintained, the testimony should not be released. U.S. District Judge J. Cullen Ganey agreed, over Jus-

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Ribicoff in 1969, "that Mr. Nader, a lawyer himself with no lack of ability in a stand-up fight, would stoop to conquer." Now let's give Nader credit for doing good things, because things *are* wrong in the country. And a smart publicist, too. He took Lloyd

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Washington lawyer, is the ability to produce a legal memorandum justifying what his client wants done. Even persons favorably inclined toward your client are more comfortable if you give them something real heavy and legal-looking to stand on." Two 1971 cases illustrate the point:

From inside the book

12 pages matching **jury** in this book

Page 113

stories about Arnold and Porter and Johnsonian cronyism, and tried hard in its early months to smear mud on A&P's bright brass doorplate. The Justice Department convened a grand jury in Cleveland to investigate what had happened in the first place.

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diverted from the German agents to spread German propaganda." According to Littell, the antitrust division pushed for criminal proceedings before a grand jury. Corcoran, however, persuaded Attorney General Biddle to settle the case via a civil consent decree.

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The Los Angeles grand jury did not agree, and the foreman advised Samuel Flatow, the Justice Department lawyer directing its work, that the majority wanted to return indictments anyway, and Washington be hanged. The grand jury could have done so

From inside the book

9 pages matching **argument** in this book

Page 183

Austern thinks it rank nonsense to credit—or blame—him for the fact that quality labeling has never passed Congress. He says he is simply a lawyer who from time to time has presented a client's argument on an issue. If "consumer advocates" had the better case, and the support of the American people. Congress

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wise for the oil industry and the power companies to call their attorneys 'public-interest lawyers,' because they can make a strong argument that they in fact *are* public-interest lawyers, the definition being as vague as it is.

"Soon after I went into practice for myself. I was approached

From inside the book

4 pages matching **clerk** in this book

Page 254

... must register with the Clerk of the House of Representatives and the Secretary of the Senate. He must file quarterly reports detailing the interest represented and the amount of money spent. Clifford and other lawyers avoid registering in a

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peal, flew to Washington early the next morning, a Saturday, and was lucky enough to find a clerk on duty at the Court of Appeals to accept his filing.

Just as he anticipated, the tobacco companies filed their ap-

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... is being used for the benefit of consumers, not the corporations.

Elman understands the New Washington Lawyers because he sees in them a reincarnation of the New Deal spirit he found when he came to Washington in the 1930s as a clerk to his old

From inside the book

48 pages matching **antitrust** in this book

Page 158

...
Sterling Products Company, was one person who sought help. The Ross firm had subsidiary and related companies in Latin America, England, and Germany, and the Justice Department's antitrust division had grave questions about some of its overseas

Page 341

restricted agreements were arguably ancillary to the joint undertaking. I will not pretend that a reasonable man, *particularly if he had a more evangelical approach* to antitrust than I have, could not have decided differently . . .

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...
The Politics of Oil.

Austern's quotation on consumerism is from "The Formulation of Mandatory Food Standards," *Food Drug Cosmetic Law Quarterly*, December 1947; on Federal antitrust activities, from proceedings of the Antitrust Law Symposium of the Antitrust Law Section, New York

From inside the book

28 pages matching **austern** in this book

Page 175

at the White House, (c) a legislative strategist who can carry through on that old chestnut, "If you don't like the law, change it" (Austern does); and (d) the most potent single voice in Covington and Burling, the chief justice of Washington's largest firm.

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retirement.

Austern doesn't think much more of the regulatory agencies than does his arch-adversary Nader, but for very different reasons. Listen to him for several hours, and read his speeches and bar and trade journal articles, and the frustration and outrage are

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it, determines the price. If the quality was clearly marked, the housewife could ignore the brand names and buy on the basis of quality.

Austern rallied opposition when Tugwell's proposal went before Congress. At one meeting of the National Canners Associa-

From inside the book

"clark clifford"

Search

27 pages matching "clark clifford" in this book

Page 3

God, I thought, I am doing Clark Clifford a favor by interviewing him.

I told this to another writer a few days later. "Jesus," he said, "Clifford sure conned you."

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count of Clark Clifford's first day in court in St. Louis, Missouri, in 1929, and the fact that he had evaded me by exactly forty years does not disturb me at all. I am too busy listening to the Gospel as spoken by Clark Clifford, and scribbling furiously

Page 102

Newton gets the suit, he says, he'll cuss and call me a son of a bitch and the whole business. But he'll pay it. And next year, when he's down in Miami Beach playing gin rummy with his buddies, he'll talk about his 'friend Clark Clifford' and his 'lawyer Clark Clifford,' and how much the so-and-so charged him—

From inside the book

86 pages matching **committee** in this book

Page 55

conducted," a member of the committee told me. "There are some firms around the country—I can think of one in Cleveland, and in Dallas and on the Coast, and right here in Washington, for that matter—that are dictatorial, with one man in complete control. Not every lawyer likes to be involved in the

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sion. Nonetheless, a conservative local bar could destroy the public-interest lawyers through a war of attrition.

Any self-policing should start at the top, which is to say, within the American Bar Association itself. The ABA is a caricature of what is wrong with Washington Lawyers' domination

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The data on the Sugar Lawyers is from hearings before the House Agriculture Committee, *Extension of the Sugar Act*, February–May 1971; a staff report of the same committee, *The United States Sugar Program*, December 31, 1970; and foreign agent registration statements filed with the Internal Security Division of the Department of Justice.

From inside the book

36 pages matching **corcoran** in this book

Page 154

name, was one Corcoran tool. Another, perhaps even more important, was a careful seeding of the Federal government with men loyal both to FDR *and* the positions Tommy Corcoran advocated within the Administration. *U.S. News* (now *U.S. News & World Report*) in a somewhat awed appraisal of Corco-

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Corcoran but saw him anyway. What Corcoran did not know was that for a time Kline had instructed his secretary not to make any appointments for Corcoran or put through his phone calls. "I told her that I didn't want to see him anymore. I felt he was perhaps going outside of the record in some of these cases

From inside the book

71 pages matching **corporate** in this book

Page 70

officer Clifford did not participate in the 1968 campaign—although his law partner, former CIA official Thomas D. Finney, helped direct Senator Eugene McCarthy's Presidential bid. And as of mid-1971 Clifford was the chief foreign policy adviser to Senator Edmund Muskie, who he early decided was the most

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hard core of his sincerity. Cutler has more faith than most of us in the public spirit of corporate moguls. He thinks he can cajole these people, and pat them on the back, and lead them to good citizenship (i.e., building safe cars that don't emit deadly gunk).

Page 367

and who forced America's largest industrial corporation to spend more than \$400,000 in a proxy fight with its own shareholders—which is to say, its owners. Phil Moore, corporate guerrilla, patiently maneuvering General Motors toward a con-

From inside the book

15 pages matching "lloyd cutler" in this book

Page 322

... Ribicoff in 1969, "that Mr. Nader, a lawyer himself with no lack of ability in a stand-up fight, would stoop to conquer." Now let's give Nader credit for doing good things, because things *are* wrong in the country. And a smart publicist, too. He took Lloyd

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settle several stockholder suits which gave the U.S. a marketable clear title to the company and then complete the public sale. Lloyd Cutler on the Supreme Court, replacing Justice Tom Clark; Lloyd Cutler in the Commerce Department as deputy to his old friend Secretary John Connor early in the Johnson Ad-

Page 337

... certainly Lloyd Cutler knows that the time to work on a bill is *before* it is introduced, and that is what he did. The criminal sanctions weren't in the Administration's bill because Cutler got them out at the drafting stage. As I was saying, you have to listen between the lines when Lloyd Cutler is talking, because he

From inside the book

40 pages matching **nader** in this book

Page 21

well . . .

And Ralph Nader. This Man Nader, engaged in a Nader's Raiders study of the firm. This Man Nader wanted to interview every partner and every associate in the firm, and on the record. This Man Nader wanted access to Covington and Burling's

Page 322

assistant to Dr. Milton Eisenhower, the chairman, says, "Cutler was scrupulous about it, too; he kept away from TV altogether.")

Sighhhhh. Then Nader. What *can* be done about him? A law-

From inside the book

45 pages matching **nixon** in this book

Page 125

[then Vice President] through having Eddie Rickenbacker [president of Eastern Airlines] contact [Attorney General] Bill Rogers in the [Justice] Department.

I agreed that Nixon was the right man, but thought we might get the story even more satisfactorily through Bob

Page 233

ating defeat in the 1962 California gubernatorial election. Nixon wanted a place to rebuild his life and to make money while doing so. He found some peculiarly appealing qualities in New York; to Robert J. Donovan of the *Los Angeles Times* he described it as "a new old and more subtle and more exciting

Page 237

former Vice President enabled Nixon to obtain briefings from old State Department friends before his foreign travels. He was especially interested in Taiwan, whose long time ruler, Chiang Kai-Shek, gave Mudge Rose client PepsiCola an exclusive franchise arrangement.

From inside the book

12 pages matching "penn central" in this book

Page 245

[the banks] was pulling the rug out from under the company." Board chairman Stuart Saunders on May 19 told Secretary of the Treasury David M. Kennedy of the tightening bind on his company; that the debenture issue had failed; that if Penn Cen-

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bank loan. Board meeting notes show Patman's antagonism and the directors' reciprocal bitterness: Director Seabrook, for instance, quotes Patman as saying he was "sorry that Administration failed to go through [with the guarantee] because he wanted to knock hell out of it." Paul Gorman, the Penn Central

Page 251

Banking and Currency Committee is shaky. He holds the chairmanship by virtue of the seniority system, but Democrats have voted with Republicans to override him in the past. In the instance of Penn Central, the GOP members told Patman, "One scent of partisan politics, and we'll gut you."

From inside the book

58 pages matching **senator** in this book

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"we have made contact with a powerful law firm in the Senator's home state." Karasik, who did not name the Senator in the memo, continued:

The senior member of the firm is the executive officer of

Page 278

Jerry S. Cohen, longtime chief counsel and staff director of the Senate Antitrust and Monopoly subcommittee and now in private practice, agrees; indeed, he told me, "The secret to Clark Clifford's success is his ability to convince a Senator that 'It's to your advantage to do it this way'—which is to say, Clifford's

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letter and seeks out a Senator who will have it typed on official stationery and mailed under the Senator's signature. Senator Russell Long frequently obliges him; so did Senator Everett M. Dirksen before his death. Says the IRS man, "If the Senator is a straight-shooter he will say to Maer, 'You write a letter to me

From inside the book

1 page matching **manage** in this book

Page 313

managed to cut the vote to 8-7, but remarked to Field after his defeat, "It'll never come out of the statute." Comments Field, "He's right—it's engraved on stone."

How did you do it? I asked Duncan. How did you manage to persuade Mills to recommit the bill and insert your amendment?

From inside the book

24 pages matching **trial** in this book

Page 75

Page 75

Page 345

TO NADER, the most grievous part of the decision was that it permitted the AMA and the Big Four to avoid public trial. Nader considered this bad for two reasons.

After years of jousting with corporations, Nader realized their dread of adverse publicity—that the most effective way of halt-

From inside the book

2 pages matching **trials** in this book

Page 121

the academic expert on China, raised the issue of the most
bizarre indictment since the Salem witch trials: perjury, for
denying to a Senate committee that he was a "follower of the
Communist line" and a "promoter of Communist interests."
Judge Luther Youngdahl, a former Republican Governor of

From inside the book

6 pages matching **defendant** in this book

Page 121

act was the result of mental disease, the defendant could be
acquitted on the ground of insanity. For the equally obscure
Clarence Gideon, the Florida ne'er-do-well, Fortas took a Su-
preme Court assignment and won the case establishing that de-
fendants, even indigent ones, must have counsel at all stages of a

From inside the book

88 pages matching **washington** in this book

Page 5

talk. we talk about the weather, and the merits of station wagons. Big stuff." This from a specialist in transportation law, a man who was involved in two landmark rail merger cases, but who is completely unknown outside the tight circle of fellow practitioners in the field.

From inside the book

27 pages matching **district** in this book

Page 127

attorney during Johnson's reign as Senate majority leader, Vice President, and President.

Johnson met Fortas when he was a first-term Congressman hot after public power for his Texas district, and Fortas, as director of the Department of the Interior's division of electric

From inside the book

67 pages matching **right** in this book

Page 121

right to learn . . . what the offense of which he had been convicted was.” Arnold, Fortas and Porter chased this cloud through the courts for seven years before the government blushed and gave the men their back pay. And Owen Lattimore, the academic expert on China, hailed into court on the most

From inside the book

20 pages matching **rights** in this book

Page 61

Hoffa take the Fifth Amendment more than one hundred times before the Senate rackets committee. The Bill of Rights, this man says, is a very encompassing guarantee, and it protects corporations and individuals alike, and once you start waiving it

From inside the book

90 pages matching **client** in this book

Page 314

for any case in which timing is an important factor." Not every case results in a multibillion-dollar saving for a client, such as Mike Duncan gained for the shale oil industry. But Caplin says the same principles apply in any tax proceeding: Know the peo-

From inside the book

82 pages matching **clients** in this book

Page 6

concentration, one with the trappings but not the reality of regulation, one which stifles competition in the name of an "orderly" market.

Lee Loevinger, formerly a member of the Federal Communications Commission, now an attorney in Washington, once

From inside the book

12 pages matching **enter** in this book

Page 255

"The same lawyers would never consider taking the same approach to the courts and counsel the client as to how to enter a plea and then send him off to the courthouse to follow instructions," Ablard wrote in a 1970 law review article. "Yet the strange stigma that some seemingly sophisticated members of the

From inside the book

72 pages matching **counsel** in this book

Page 228

Hargrove wrote in another memo in August 1970, "the issuer [USPS] would normally have a good deal to say about the counsel the underwriters selected, although the underwriters themselves engaged such counsel and pay their fees."

Nine months later, in May 1971, USPS permitted the leading

From inside the book

1 page matching **address** in this book

Page 328

and Moore. (Wilmer, Cutler and Pickering now serves as the Washington office of Cravath, Swaine and Moore; the two firms even share the same address and phone number in the Washington telephone directory.)

From inside the book

59 pages matching **senate** in this book

Page 276

son (D., Va.), then chairman of the Senate Banking and Currency Committee, which had jurisdiction over the bill. For safety's sake, Carey decided to make one last round of Committee members, particularly one Senator who opposed the insurance portion of the bill

From inside the book

58 pages matching **justice** in this book

Page 262

ment in 1950 and formed a law partnership. An early client was the Dominican Republic. In 1954 the firm signed two separate agreements: one provided a flat fee of \$95,000, which was reported to the Justice Department under the Foreign Agents Registration Act; the other, unreported, called for a bonus of \$1 per

From inside the book

57 pages matching **money** in this book

Page 62

for not hiring better attorneys. Or at Congress for not providing enough money to hire them. Or at yourself for not being willing to pay the taxes to provide the money to hire the better attorneys. And so forth.

When public-interest law became fashionable in Washington

From inside the book

"covington and burling"

Search

84 pages matching "covington and burling" in this book

Page 21

Covington and Burling: The Pinnacle of Power 21

Page 51

Covington and Burling: The Pinnacle of Power 51

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right in the middle. What would we do with a former chairman of the FTC? Hell, show me anybody in Washington who knows more about the FTC than Tommy Austern and I'll give you the keys to the office. Or the CAB. Remember, Howard Westwood *created* the CAB." Covington and Burling does not frown at

From inside the book

26 pages matching "mudge rose" in this book

Page 221

Mudge, Rose, Guthrie and Alexander

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Page 239

Mudge, Rose, Guthrie and Alexander

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relying upon a Mudge Rose legal opinion* to fight a former Mudge Rose partner [Nixon]."

Mudge Rose and its predecessor firms have maintained offices in Washington since the early 1950s, according to Randolph Guthrie. His cited reasons are the same as any out-of-town firm

From inside the book

41 pages matching **fortas** in this book

Page 112

tion, and especially young lawyers with consciences rent tender by the performance-promise gap of the sixties, Fortas's acceptance of a \$20,000 fee from the foundation of financier Louis Wolfson was no particular surprise; indeed, to some it epitomized Fortas. Within the bounds of the law, but at the outer edges of propri-

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Arnold and Porter: Silent, as in Fortas

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Page 128

turer named James Ling and by 1962 had started Ling-Temco-Vought on a dizzying rise through the financial world. Both Post and Ling are friends of Lyndon Johnson, through whom they came to know and trust Abe Fortas. In 1962 Fortas helped Post

From inside the book

71 pages matching **administration** in this book

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taking a position *in* the Kennedy Administration (assuming, as Clifford did early, that Kennedy did win) but who intended to do a great deal of business *with* the Kennedy Administration. Clifford would handle the transition from Eisenhower to Kennedy. He went to work in early fall drafting a document detail-

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was Nixon's liaison with the lame-duck Johnson Administration, while John Sears was the special emissary to Spiro T. Agnew; both took middle-echelon positions in the Administration. And corporate Washington—the lobbyists and trade associations and

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Cutler, in rebuttal, denies that criminal penalties were ever a priority item for the industry, although it "did and does" oppose them. Further, he notes, criminal sanctions were never in the auto safety bill—neither in the original Johnson Administration submission, nor in the versions reported from the House and

From inside the book

16 pages matching **airline** in this book

Page 33

placed upon the freedom of unsubsidized carriers to fly over any route or into any territory. Further, entering the airline business required nominal capital investment: The airways were free, and navigational and other operational facilities were maintained or subsidized by the government. A fledgling airline did

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economic consequences of the aviation plan lawyer Westwood wrote for the ATA. Postmaster General James A. Farley noted that the government had spent "hundreds of millions of dollars in the building of airports, installation of beacon lights, etc., and direct subsidies paid to the contractors. Now that the financial

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black passengers on nights from New York. When the airline faced loss of its landing rights at Kennedy International Airport in New York, Covington and Burling defended it, first before the New York State Commission on Human Rights, then in United States District Court. The representation disgusted the

From inside the book

66 pages matching **american** in this book

Page 23

sources seaward of the two-hundred-meter line. The United States government submitted a draft treaty—lawyer Laylin's handiwork, basically—to a United Nations committee in August 1970. On another front, as chairman of a special American Bar Association subcommittee, Laylin is mobilizing bar support

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pendent Indonesia.

The gas bill veto was enough to shatter any subconscious thoughts Clifford might have entertained about building a law practice on Truman's name. So did another early case, this one on behalf of Howard Hughes's TWA. Arch-rival Pan American,

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American World Airways paid him a retainer of \$30,000 a year, although he never appeared on its behalf in a formal proceeding at the Civil Aeronautics Board (Steptoe and Johnson, a conventional firm that does conventional aviation work, received fees

From inside the book

27 pages matching **argued** in this book

Page 106

By mid-March Clifford had concluded the United States should start winding down the war and get out of Vietnam. He argued, as he wrote later, "that the United States had entered Vietnam with a limited aim—to prevent its subjugation by the north and to enable the people of South Vietnam to determine

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right to learn . . . what the offense of which he had been convicted was." Arnold, Fortas and Porter chased this cloud through the courts for seven years before the government blushed and gave the men their back pay. And Owen Lattimore, the academic expert on China, hailed into court on the most

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nal group calling itself SOUP (Students Opposing Unfair Practices) argued that Campbell should have to inform customers they had been deceived. The FTC rejected SOUP's novel argument by a 4-1 vote but said such ads might be appropriate in some situations. SOUP tried again a year later with Firestone

From inside the book

83 pages matching **asked** in this book

Page 42

Claus asked me if it wasn't true that I loved my mommy and poppy and that I was the dearest, sweetest and best little boy in the whole, wide world . . .

Chairman Kefauver had difficulty in holding onto his judicial mien when the GOP solon asked the witness if he

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explaining that corporations have a right to legal representation," a senior partner says. "I'm always getting questions like, 'Will I *have* to represent corporations? Or anyone else who comes along?' One year the question was, 'What, for example, would Covington and Burling do if you were asked to represent

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"What hadn't he said?" asked Bennett.

"I don't know," Corcoran said.

"Well," continued Bennett, "have you followed this policy of going to the Commissioners, as you did in this case, in all of the cases that you have tried before the Federal Power Commission?